No. 10,823

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PIERRE BERCUT and JEAN BERCUT, Individually and as Copartners doing business as P & J CELLARS (a Copartnership),
Appellants,

vs.

PARK, BENZIGER & Co., INC. (a Corporation),
Appellee,

and

PARK, BENZIGER & Co., INC. (a Corporation),
Cross-Appellant,

vs.

PIERRE BERCUT and JEAN BERCUT, Individually, and as Copartners doing business as P & J CELLARS (a Copartnership),
Cross-Appellees.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

We have already stated the most essential facts of this case in the opening brief on our cross-appeal. The defendants (Bercut Bros.) agreed to sell 60,000 cases of wine to plaintiff (Park, Benziger & Co., Inc.) under a written contract. On April 27, 1943, defendants committed an anticipatory breach by announcing

to plaintiff that they would not sell or deliver to them any wine under the contract. Defendants subsequently sold the wine to other customers at a higher price. See R. 398 (Jean Bercut):

> "Q. Didn't you sell Mr. Harry Rathjen, who testified here yesterday, some of the wines, some wines covered by the contract here in issue, at a price in excess of the contract price?
>
> A. Yes, at a later date, much later date; in May or sometime."

The jury on the second trial returned a verdict for $72,687.50. Appellant does not question the sufficiency of the evidence to show an anticipatory breach. After quoting the evidence (Appellants' Op. Br. p. 23) counsel say that Elman (plaintiff's Vice-President, R. 69) "treated" the facts as "a repudiation i.e., as an anticipatory breach", and make no attempt to deny that Elman was entirely justified in so doing.

The appellants nowhere touch the issue of liability. Their arguments go entirely to questions of damages and to collateral matters. Throughout the statement of the case (Appellants' Op. Br. pp. 2-31) however, there is an effort to color the facts in appellants' favor—in spite of the rule that an appellate court must take the evidence favorably to the appellee. In some instances this goes so far as to change the picture given by the evidence, so that if the record is history, the brief is historical fiction.

For the most part we do not attempt to recite all the facts in detail at this time. Relevant facts will be given with the arguments to which they apply. Appel-

lants' more irresponsible misstatements are gathered into Appendix "A" together with quotations showing what the record really says.

We call attention to one matter here, however. Counsel try to give the impression that their clients are inexperienced innocents, wandering like babes in the woods of business (Appellants' Op. Br. pp. 7 (quotation) 8, 9, 10.) This picture is belied by their testimony:

Jean Bercut (R. 379-80):

"Q. How long have you been in business, Mr. Bercut?

A. Thirty years.

Q. How many enterprises have you been connected with?

A. Many.

Q. How many?

A. Well I would say the meat business, the hide business, the wine business, the real estate business."

W. G. Evans (R. 399-400) (called by defs.):

"Q. The Merchants Ice and Cold Storage Company is simply one of many activities, is it not?

A. Of the Bercut Brothers, yes.

* * * * * * *

Q. What other activities, major activities have you been connected with in Bercut Brothers as an associate or as an employee?

A. I have attended to the financial matters in most of the enterprises.

Q. The Grant Market on Market Street?

A. Yes, sir.

Q. What else, state specifically.

A. Bercut-Richards Packing Company, Sacramento,—English Estate Company,—Markets Investment Company,—Bercut Bros.—P & J Cellars,—Chateau Apartments,—Celeste Apartments,—Tiffany Apartments,—2166 Market Street,—properties in Richmond,—The Arco Apartments,—20th Avenue Apartments."

In general, a reading of the evasive and self-contradictory testimony of the defendants, particularly the cross-examination of Jean Bercut (R. 356-98) furnishes ample reasons why the jury resolved questions of fact in favor of the plaintiff.

We now answer defendant-appellants' individual arguments:

I. LOST PROFITS RECOVERABLE REGARDLESS OF DEFENDANTS' KNOWLEDGE OF LACK OF AVAILABILITY; DIRECTED VERDICT PROPERLY DENIED (Appellants' Br. pp. 39-54, 70).

In their statement of the case, defendants repeatedly emphasize that when the contract was executed Hermann did not tell defendants that there was no other source of supply if defendants should breach their contract. Hermann undoubtedly expected the contract to be performed, and so did not discuss his position in the event of a breach by defendants. But the question of "notice" which counsel argue at such length (Appellants' Op. Br. pp. 39-54) is a completely false quantity. Upon the record, the court correctly applied loss of profits as plaintiffs' measure of damages.[1]

[1]This measure of damages was correct, regardless of alternative measures which might also have been applied, as set forth in our Cross-Appellants' Opening Brief.

A. GOVERNING AUTHORITIES.

1. Counsel spend 15 pages of their brief (pp. 39-54) confusing two rules of law, but do not discuss the authorities on which the trial court sustained plaintiff's position.

This 15 page discussion deals with the rule of *Hadley v. Baxendale* and with uniformity of decision—neither of which is an issue. The case was submitted to the jury in accordance with defendants' contention that there was no available market for the type of wine which defendants failed to deliver. The question then arises—what is the measure of *general damages* under such circumstances?

Section 1787 of the Civil Code states the rules of damages under the Uniform Sales Act as follows:

> "(1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.
>
> (2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the sellers' breach of contract.
>
> (3) Where there is an available market for the goods in question the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

Subsections (2) and (3) deal with measures of damages. Subsection (3) fixes damages where there is an available market. Subsection (2) applies to *other* cases. Therefore Subsection (2) governs the present case, where there is *no* available market.

Subsection (3) *which does not apply here* contains two provisions. In first line it says that where there is an available market the damages shall be the difference between the contract price and the market price. It makes a secondary provision that *higher damages* may be recovered where special circumstances show proximate damages of a greater amount. Such damages are known as "special damages". As will be shown below, the courts have likewise recognized the principle of special damages in cases falling under Subsection (2).

The point to be kept in mind is that special damages are damages *in excess of general* damages. They may be awarded *where special circumstances show that damages beyond general damages* have proximately resulted.

One form of special damages is loss of profits upon a *specific resale* contract which the buyer may have made or may be about to make. Such damages may be recovered though they are greater than general damages, provided the other party to the contract is put on notice of the special conditions.

We shall show infra, that all of defendants' citations fall into this category. But, our problem is different. It is to fix *general damages* when the goods in

question cannot be obtained on the market. The rule here is that *general damages* are the profits which the buyer would have made *in the general course of his business* (rather than upon any particular contract of resale).

Absence of an available market is the general situation contemplated by Subsection (2) of Section 1787 of the Civil Code and need not be specially brought to the seller's attention. Furthermore, since the damages sought are by definition general damages, they do not depend upon the seller's knowledge. This has been held without detailed discussion by California cases both before and since the Sales Act. The New York Court of Appeals in *Orester v. Dayton Rubber Mfg. Co.,* 228 N.Y. 134, 126 N. E. 510 after full discussion adopted this same rule as the proper application of the Sales Act. Other jurisdictions are to the same effect.

The earliest *California case is McKay v. Riley,* 65 Cal. 623, which says that where the goods cannot be gotten in the open market the buyer's measure of damages is his loss of profit. No reference is made to notice.

The latest California decision seems to be *Coates v. Lake View Oil Co.* (1937), 20Cal. App. (2d) 113; cited at page 57 of defendants' brief, and previously cited on their 26th request for instruction (R. 54.) This case states exactly the same rule as *McKay v. Riley:*

> (p. 48) "Assuming that there was no established market value of the motor fuel, the proper measure of damage, on this phase of the case,

would have been the loss of profits, if any, suffered by plaintiff by reason of the breach of contract by defendant in its failing to furnish him with approximately 1,217,250 gallons of motor fuel for which no substitute was available and none was purchased".

We cited *Orester v. Dayton Rubber Mfg. Co.,* 228 N. Y. 134, 126 N. E. 510, in the District Court. It is most closely in point and gives the best discussion of the law, *yet defendants have not so much as mentioned it in their present brief.*

The New York Court of Appeals says in so many words, that where there is no general market, and no special circumstances known to the parties, the buyer's measure of damages for non-delivery is the ordinary profit which he would have made in his business, had the seller performed. (See p. 511):

> "Such is the case before us. The plaintiff could not purchase the tires from others in Syracuse." (p. 512) "As there must be a new trial we should determine the proper rule of damages * * * Finally, if none of these tests [purchase on open market, purchase of substitutes] are practicable, another must be adopted. *We are not dealing here with circumstances known to both parties at the time the contract was executed, which made it of peculiar value to the plaintiff. We are not concerned with collateral engagements or consequential damages.* We seek some formula under which the jury may determine the natural, the usual, value of such a contract to any one, under ordinary conditions * * * Here the tires were purchased to be resold at a profit. This profit, if

reasonably certain may be said to measure the value of the contract to the plaintiff. It was this that he lost by the default of the defendant. Not the gross profit, however, which is what the jury was permitted to allow. What the plaintiff might have made had the contract been carried out was this gross profit less the expenses of the business properly chargeable to the sale of the Dayton tire * * *

We decide nothing as to special damages which must be alleged in the complaint. That question is not now before us. We hold only that upon the facts presented, in determining *the natural and proximate damages suffered by the plaintiff for the breach of this contract, if the other tests fail, he may prove the ordinary and usual net profits resulting from business conducted in the ordinary and usual way, which he had lost by reason of such breach.*" (Emphasis added.)

Followed in *Hedeman v. Fairbanks, Morse & Co.,* 36 N. E. (2d) 129, 133 (N. Y.).

See also, to the same effect as the California cases:

Talcott v. Freedman, 149 Mich. 577, 113 N. W. 13.

Defendants spend much space arguing in favor of uniformity of decision under the Sales Act. We fully agree, since that strengthens the application of *Orester v. Dayton Rubber Mfg. Co.,* supra. Where goods are not available on the market, the measure of general damages is loss of profits which would have resulted in the ordinary course of plaintiff's business. Since the damages are general, they are not dependent on notice to the seller.

B. DEFENDANTS' AUTHORITIES NOT IN POINT.

From first to last, defendants' authorities deal solely with *special damages. Hadley v. Baxendale,* 9 Exch. 341 itself states the rule as to when the plaintiff may recover special damages beyond the ordinary measure. Furthermore, this was a suit for damages for negligent delay in performance and not a suit for non-performance.

In *Marcus & Co. v. K. L. G. Baking Co.,* 3 Atl. (2d) 627 (Appellants' Op. Br. pp. 40-42), the plaintiff based its entire case upon loss of profits from a *particular contract* of resale. The boldface quotation on page 41 of the defendants' brief refers to the damage as "special damages".

The quotation from *Mitchell v. Clark,* 71 Cal. 163 (Br. pp. 46-7), likewise deals with (p. 169) "Evidence on the part of plaintiff of damages beyond such as the plaintiff would ordinarily be entitled to recover for a breach of contract." (Defendants do not quote this sentence.) The same is true of *Hunt Bros. v. San Lorenzo Water Co.,* 150 Cal. 51, and *Overstreet v. Merritt,* 186 Cal. 494, cited in the brief on pages 46 and 47. The passage from Williston on page 47 is misquoted, a matter to which we shall return later. Defendants made the same misquotation in the District Court and were apprised of it, but have repeated it here (see infra p. 12).

In *Globe Refining Co. v. Landa Cotton Oil Co.,* 190 U. S. 540, the goods *were available* in the open market, and the case deals with the right to special damages in such a situation.

Czarinkow-Rionda Co. v. Fed. Sugar Ref. Co., 255 N. Y. 33, 173 N. E. 913, 88 A. L. R. 1426, likewise involved special damages only (recovery of amounts which plaintiff had to pay to specific customers when it became unable to perform its agreements with them).

In other words, defendants' authorities do not touch the issue of this case.

It is obvious that if defendants' arguments were accepted they would lead to fantastic results. They claim that absence of an available market must be brought home to the seller, or else the buyer cannot recover damages which accrue under such circumstances. (Damages where there *is* an available market would be excluded as inapplicable.) This would mean that in the ordinary case where the parties do not discuss surrounding circumstances, if the seller fails to deliver replaceable goods, he is liable in damages, but if he fails to deliver irreplaceable goods, he gets off scot free. This is absurd.

C. SUMMARY.

The rule of general damages for failure to deliver goods unobtainable on the open market under the Uniform Sales Act is stated in *Orester v. Dayton Rubber Mfg. Co.*, 228 N. Y. 134, 126 N. E. 510. Under that rule the buyer can recover lost profits as general damages regardless of whether the seller knows the goods to be unobtainable on the market. Defendants' arguments about notice of unavailability are taken from the rules of special damages. No evidence of

special damages was offered by the plaintiff. Under the authorities plaintiff made a valid case for general damages.

II. RECORD SUPPORTS FINDING DEFENDANTS HAD REASON TO KNOW WINE UNAVAILABLE.

Apart from the point that defendants' knowledge of plaintiff's profits is immaterial the record supports the inference that defendants knew or had reason to know the condition of the wine market. In this connection counsel's misquotation of Williston is significant (Defendants' Br. p. 47, referred to above).

Defendants have miscopied Section 1347 of Williston on Contracts to read "when a defendant *has been notified* * * * that unusual damages will follow * * * The defendant may have had *notice* of a sub-contract * * *". The italicized words are not in the text. Williston's language is:

> "When a defendant has *reason to know* * * * that unusual damages will follow * * * The defendant may have had *reason to know* of a sub-contract."

"Reason to know" is clearly broader than the phrases used by defendants. The record in the present case contains plenty of evidence that the defendants had reason to know of the condition of the wine market. In fact, the only way in which they could remain ignorant would be to shut their eyes to it. Both defendants were shrewd and experienced business men with large business interests (see testimony as to their

business experience, pp. 3-4 supra). They knew how to make themselves acquainted with business conditions. The least inquiry would have revealed the state of the wine market. In fact the court says that the rising liquor market was a matter of common knowledge (R. 237) and it is significant that the defendants themselves anticipated rise in prices, saying the wine would soon be worth $8, $9 or $10 a case (R. 122, 180). Under these circumstances defendants' professions of blissful ignorance need not be taken at face value. Rather they point to the opposite conclusion. Compare *Spore v. Washington,* 96 Cal. App. 345, where the court said (p. 355):

> "From the facts adduced the jury might easily have concluded that the slightest inspection would have disclosed the conditions actually existing. * * * In *Wile v. Los Angeles Co.,* 2 Cal. App. 190, it is aptly said, 'the fact that the manager did not know who placed these boards there might have led the jury to infer that he did not want to know.' While the facts in that case need not be detailed, the same thought may have been with the jury in this trial."

In short the record supports the finding that defendants knew or had reason to know of the profits which plaintiff would have been able to make upon the resale of the wine.

III. EVIDENCE OF LOST PROFITS SUFFICIENT
(Appellants' Br. pp. 54-61).

Subdivision III of appellants' opening brief consists of a mélange of miscellaneous points, having no other connection than that they all deal with the general subject of damages.

In this section we shall *answer* the points (a) that there was supposedly an insufficient foundation to give the issue of profits to the jury at all; and (b) that plaintiff supposedly showed gross rather than net profits.

A. SUFFICIENT EVIDENCE TO SUBMIT ISSUE OF ANTICIPATED PROFITS TO JURY.

1. Governing Law.

Defendants contend that on the evidence, prospective profits are not a proper measure of damages. This in turn is based on the claim that there is not enough evidence from which to determine prospective profits. Damages are a matter of substantive law (35 C. J. S. 1296-7) as is the sufficiency of evidence (*Chicago M. & St. P. v. Coogan,* 271 U. S. 472, 474, 70 L. Ed. 1041, 1044). So on this issue California law governs (*Six Companies of Cal. v. Joint Highway Dist. No. 3,* 311 U. S. 180, 85 L. Ed. 114, applying California law; *Erie R. R. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188). (The contract was executed in California, and was to be performed there; the wine was sold F. O. B. San Francisco; R. 73, 74, 171: 78, 79.) The question then is, whether the record contains evidence, which, under California law makes loss of profits a correct measure of damages. The latest California Supreme Court case

touching this subject is *Natural Soda Products Co. v. Los Angeles,* 23 Cal. (2d) 193 (cited Appellants' Op. Br. p. 56) where the Supreme Court states the rule as follows:

> (p. 199) "The award of damages, for loss of profits depends upon whether there is a satisfactory basis for estimating what the probable earnings would have been had there been no tort. * * * If * * * there has been an operating experience sufficient to permit a reasonable estimate of probable income and expense, damages for loss of prospective profits are awarded."

Citing with approval *Hacker etc. Co. v. Chapman V. Mfg. Co.,* 17 Cal. App. (2d) 265, 267:

> "It is well established that damages consisting of the loss of anticipated profits need not be established with certainty. It is sufficient that it be shown as a reasonable probability that the profits would have been earned except for the breach of the contract."

These quotations show that California has no hard and fast or mechanical rule for estimating future profits. The plaintiff is not held to proof of profits in past years—in fact, the *Natural Soda Products* opinion (p. 200) holds that the profit and loss statement of years immediately preceding may be entirely inconclusive. *Evidence is legally sufficient* if it is *logically sufficient* to form an estimate of prospective profits.

And the rule denying damages for uncertainty deals with the *fact* of damage rather than its amount. See *Story Parchment Co. v. Patterson P. Paper Co.,* 282

U. S. 555, 75 L. Ed. 544 (cited with approval in *Natural Soda Products v. L. A.,* 23 Cal. (2d) 193, 200):

> (p. 562) "It is true that there was uncertainty as to the extent of the damage but there was none as to the fact of damage, and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

This case is relied on in the *Natural Soda Products* opinion, and shows that the same rule holds *under California and under Federal law* (Sherman Anti-Trust Act).

2. Appellants' Citations Bad Law or Not in Point.

Pages 56 and 57 of appellants' brief are spread with a list of cases, none of which is in point.

Gibson v. Hercules Mfg. & Sales Co., 80 Cal. App. 689, and *California Press Mfg. Co. v. Stafford Packing Co.,* 192 Cal. 479, are distinguished in the *Natural Soda Products* opinion, 23 Cal. (2d) 193, 199:

> "If no such basis exists, as in cases where the *establishment of a business is prevented,* it may be necessary to deny recovery. (*California P. Mfg. Co. Inc. v. Stafford Packing Co.,* 192 Cal. 479, 485; *Gibson v. Hercules Mfg. Co. Inc.,* 80 Cal. App. 689.) If, however, there has been op-

> erating experience sufficient to permit a reasonable estimate of probable income and expense, damages for loss of prospective profits are awarded."

Since *Natural Soda Products v. L. A.,* 23 Cal. (2d) 193, is the latest California Supreme Court decision, it must control over defendants' other citations. *Central Coal & Coke v. Hartman,* 111 Fed. 96, is an Eighth Circuit case which is almost directly contrary to *Story Parchment Co. v. Patterson P. Paper Co., supra.* The *Central Coal* case holds that lost profits must ordinarily be held too speculative and that damages are the exception. This case can no longer be considered the law even within its own jurisdiction (under the Sherman Act). It was cited by the losing side in *Story Parchment Co. v. Patterson P. Paper Co.* (75 L. Ed. 544, 546, col. 1, ft.; see also the Circuit Court opinion 37 Fed. (2d) 537, 539, ft.). The Supreme Court of California has followed the *Story Parchment* decision.

Iron City Toolworks v. Welisch, 128 Fed. 693 (C. C. A. 3), is another case which speaks of damages for lost profits as the "exception" and denial of such damages as the "rule" (128 Fed. 693, 696). It is inconsistent with the law as ultimately laid down both by the Supreme Court of the United States and the Supreme Court of California.

Terre Haute Brewing Co. v. Dwyer (1940), 116 Fed. (2d) 239, is an Eighth Circuit case, decided subsequent to *Erie R. R. v. Tompkins* (1937). It applies the law of the *State of Missouri* (116 Fed. (2d) 239,

242), and is therefore not relevant in a case depending upon the law of *California.*

Thrift Wholesale Inc. v. Malkmillion Corp. (1943), 50 F. Supp. 998, applies the *law of New Jersey* (50 F. Supp. 998, 1000) even commenting upon its strictness in refusing to grant damages (50 F. Supp. 998, 1000, col. 1, top). The holding is obviously inapplicable to a case involving California law. The same is true of *Salaban v. East St. Louis Co.,* 1 N. E. (2d) 731 (Ill. App.), which applies the law of Illinois.

Appellants also cite three California Appellate cases, *Coates v. Lake View Oil & Ref. Co.,* 20 Cal. App. (2d) 113, *Stephany v. Hunt Bros.,* 62 Cal. App. 638, and *Austin v. Roberts,* 130 Cal. App. 328. All are necessarily subordinate to the later Supreme Court decision (*Natural Soda Products v. L. A.*) especially as no petition for hearing was filed in any of them (Cf. *Nichols v. Superior Court,* 1 Cal. (2d) 589, 595, commenting on a District Court of Appeal decision from which no petition for hearing was filed. See also, *People v. Davis,* 147 Cal. 346, 350; *Bohn v. Bohn,* 164 Cal. 532, 537-8; and *People v. Rabe,* 202 Cal. 409, 418-9, all holding that a Supreme Court decision controls over earlier District Court of Appeal cases even where a hearing was asked and denied). But *Coates v. Lake View Oil Co.,* 20 Cal. App. (2d) 113, 118, recognizes lost profits as a general measure and does not attempt to lay down any hard and fast rules of evidence for proving profits. It merely holds that the plaintiff had shown gross, rather than net profits.

Austin v. Roberts, 130 Cal. App. 328, goes off partly on the matter of proximate cause, as between defendant's acts and other matters (130 Cal. App. 332-3). Partly, however, it goes back to the supposed rule that damages for loss of profits are the "exception"—which seems definitely not to be the law, since *Natural Soda Products v. L. A. Stephany v. Hunt Bros. Co.,* 62 Cal. App. 638, likewise presents the opposite approach from that taken in the *Natural Soda Products* and *Story Parchment Co.* cases. Furthermore, the case was *an appeal by the plaintiff* after *findings of fact in favor of the defendant.* On such an appeal the evidence must be taken most favorably to the defendant; the only question is whether the evidence can reasonably be construed to support the findings. In the present case, the defendants cannot prevail unless the evidence is *as a matter of law insufficient* to support findings in favor of plaintiff.

We now show that under the law as stated in the *Natural Soda Products* and *Story Parchment* cases, the plaintiff's evidence on lost profits was sufficient to go to the jury.

3. Evidence Sufficient Under Governing Authorities.

The issue is what profits plaintiff would probably have made, if it had obtained the wines covered by the contract.

This depends upon (1) the selling price; (2) the selling expenses; (3) the probability of being able to sell the wine; (4) whether these facts can be established by qualified witnesses.

The witnesses Elman, Cholet, Hermann and Lusinchi testified to facts which fully proved that plaintiff would have been able to sell all the wine under the contract at plaintiff's list prices. Appellants try to avoid the effect of this testimony by cavalierly calling it "worthless" (Appellants' Op. Br. p. 59). No argument or authority is offered to sustain this characterization.

Quotations from the record make it clear that these four witnesses were qualified to testify as they did, and that their testimony covers all phases of the plaintiff's probable profits.

We have already referred to Elman's testimony. It is quoted at length in Appendix "A". He was the plaintiff's vice-president in charge of sales and promotions (R. 69-70). Previous to the invasion of France, the company had done business in imported wines (R. 71); it had dealt in domestic wines to the extent of 10,000 cases (R. 153). The plaintiff has been in business since 1855 (R. 70). An alcohol shortage developed after the United States' entry into the war because alcohol is used in smokeless powder. A whiskey shortage and then a wine shortage followed (R. 71-72). There was a tremendous demand for wine on the dealers who had any in stock (R. 300). Plaintiff could have sold the entire 60,000 cases covered by the contract, either at wholesale or at retail (R. 301, 320). The cost would be about 6% of the selling price plus 35 cents a case transportation and insurance on retail sales (R. 304, 305, 313, 314) and 2% of the selling price on wholesale sales (R. 319). *Cholet* testified to

the same effect; his testimony is quoted in Appendix "B".

Serge Hermann gave a picture of the frantic demand as early as January 1943, about the time the contract was signed:

> (R. 188) "* * * When I came over to San Francisco I found that the Palace Hotel was filled with every person interested in the wine industry * * *."

Marcel Lusinchi gave similar testimony, also quoted at length in Appendix "B".

We have already called attention to the evidence that the defendants themselves anticipated a rise in wine prices (R. 122, 180).

All of these witnesses were qualified as experts. (See their testimony in Appendices "A" and "B".) Estimates of lost profits have been upheld upon opinion evidence (*Shoemaker v. Acker,* 116 Cal. 239, 246).

The picture drawn by this evidence is that of an extreme shortage, with a wild demand and rising prices, all uniting to produce a market in which wine practically sold itself. The seller could virtually name his own price. When Elman stated that plaintiff could have sold the entire 60,000 cases at list prices (R. 320) he was merely stating the obvious. The value and reliability of these witnesses were questions for the jury. Their testimony as to market conditions taken together with Elman's testimony as to selling costs, clearly satisfies the rule that damages may be recovered for lost profits where "there is a satisfac-

tory basis for estimating what the probable earnings would have been had there been no [breach of contract]" (*Natural Soda Products v. L. A.*, 23 Cal. (2d) 193, 199).

Appellants contend that plaintiff should have introduced evidence of its past profits on domestic wine sales, and even seem to imply that this was the only admissible evidence (Appellants' Br. p. 55).

The language of the *Natural Soda Products* opinion does not limit the plaintiff to any one particular type of evidence. In the case at bar evidence of past profits would have been logically irrelevant. Defendant's breach took place after the war shortage had set in; the period of performance of the contract would have been under war conditions. The question was as to probable profits during this period of shortage. But plaintiff's past profits were *before the shortage*—obviously under conditions less favorable to the seller than the period covered by the contract. It is a *non sequitur* to try to estimate profits *during a shortage* from business statistics *prior to its onset.* Undoubtedly defendants are calling for such evidence because they believe it would be weaker than the evidence actually produced.

A situation even less favorable to the plaintiff existed in *Natural Soda Products v. L. A.* Plaintiff there had made no profits whatever in the two years immediately preceding the flooding of its plant (23 Cal. (2d) 193, 200). But a change of conditions had promised profits in the future:

> (p. 200) "The court might well have concluded that profits were probable, since the completion of alterations enabled plaintiff to sell products from its own plant."

It was held that profits could be estimated from future probabilities rather than from past experience under dissimilar conditions. This holding also justifies the refusal of defense request No. 32 about which counsel complain at page 61 of their brief. The instruction said flatly that anticipated profits cannot be awarded in the absence of a showing of past profits, thus going squarely against this part of the *Natural Soda Products* opinion.

While defendants call for evidence of pre-1940 profits they objected to evidence of *their own sales of the same wine in 1943 and 1944.* This is the evidence discussed in cross-appellant's opening brief pages 25-34. It was excluded by the court, though we submit that it was clearly relevant on the issue of probable profits during the period of the contract. In the present case the testimony as to plaintiff's selling costs, together with the evidence of the condition of the wine market and Elman's positive (and perhaps unnecessary!) statement that plaintiff could have sold the entire 60,000 cases at its list prices, amply support a finding as to loss of profits caused by defendants' breach.

B. PLAINTIFF PROVED NET PROFITS.

At pages 55 and 57-9 of appellants' brief, counsel try to argue that plaintiff proved gross rather than

net profits. This argument is unsound on its face, since plaintiff proved (1) its gross resale price and (2) its expenses in addition to the purchase price from defendants. The difference is, of course, the net profit. Specifically, appellants first try to get rid of Elman's testimony as to cost by calling it "unsupported speculation" (Br. p. 55). Elman, as vice-president in charge of sales and promotion, was qualified to testify as to the selling expenses. Beyond that, the argument that Elman testified from memory rather than from records (Br. p. 54), is a factual argument which could have been made to the jury, but which does not militate against the sufficiency of the evidence on appeal. Counsel's second line of attack is to enumerate specific items of expense which it is claimed the plaintiff did not set forth. As to nearly all of these the answer is that they were items going into the 6% and 2% selling expense to which Elman testified. If defendants had desired the details of these totals, they could have asked for them on cross-examination. For the most part defendants did not do so. As to some of the items, there is the additional answer that plaintiff *did* prove them separately. Still other items were either not regular items of expense or were matters of defense, to be shown by defendants.

Thus on page 55 it is said:

> "No attempt was made to prove the cost of washing and polishing the bottles and wrapping them in tissue and no attempt was made to prove the cost of capital to be employed, the value of Elman's services, etc."

(Counsel undoubtedly know exactly what items they refer to by "etc.".) As a matter of fact the cost of washing and polishing the bottles was proved separately. Elman (R. 160-61):

"Mr. Naus. Q. Mr. Elman, I understood you to testify earlier today that in the course of some one or more of these discussions you had with one or the other of the Bercuts something was said about cleaning and polishing the bottles and putting tissue paper on them.

A. Yes.

Q. Did I understand you correctly to state as to the matter of the tissue paper and the like that 'We left that open more or less'? What do you mean by that?

A. I said, 'It is only a matter of a few pennies; if you don't do it I will, so what's the difference?'. Then we left it open.

Q. You mean you left it open as to who would pay for it?

A. No. I said I would pay for it if they didn't.

Q. Did you leave it open as to whether it was to be done?

A. Yes. If he didn't want to put them on, it was a matter of a few pennies a case, why I told him I would.

Q. A matter of a few what, per case?

A. A few pennies.

Q. Well, how much would these few pennies amount to, do you know?

A. I don't know off-hand, but *I would think it would amount to around 3 or 4 cents a case for the paper, 12 bottles in a case.*" (Italics added.)

(The original question here refers to washing and polishing and tissue paper. The final answer specifically mentions only tissue paper. On appeal the evidence must be considered favorably to the appellee.)

The cost of printing labels was part of the regular overhead, since Park-Benziger operated under its own label (R. 312-3, referring to the "P & B" brand name). It may reasonably be inferred therefore that this item is included in the 6% overall expense. The same is necessarily true of such routine items as the vice-president's salary, the cost of capital, and presumably minor expenses which counsel have chosen to designate by "etc.".

At page 58 appellants say:

> "No evidence was offered of the expenses incurred by Elman and Hermann traveling to San Francisco in order to carry out the contract."

Such expenses are necessarily included in the 6% and 2% to which Elman testified. These figures together with testimony as to freight charges, were made with the fact in mind that the wine was in California while plaintiff had its office in New York (see R. 313, and 319, distinguishing wholesale and retail expenses from this standpoint). Defendants could have asked for details if they had wanted them.

At page 58 counsel also reiterate the contentions made on page 55, which we have answered above. On the same page it is said:

> "No attempt was made by appellee to offer evidence of the price at which the wine could

> have legally been sold under the Emergency Price Control Act * * *."

In the first place, this is a matter of law, not of evidence. In the second place it evidently touches a supposed limitation of the gross profits, not an item of expense. In the third place, it involves a claim of supposed partial illegality, which is a matter of defense to be raised by the defendant (Rule of Civil Procedure 8(c)).

Since plaintiff proved both gross income and expenses, it proved net profits. So the contention that plaintiff claimed gross instead of net profits is simply not supported by the record.

C. SUMMARY.

The record contains sufficient evidence from which to form an estimate of plaintiff's loss of profits. Appellants' attacks upon the witnesses who gave this testimony are factual arguments which would be proper before a jury, but not in an appellate court. Plaintiff proved both its probable gross profits and its expenses, the difference being probable net profits.

IV. PLAINTIFF'S PROFITS NOT LIMITED TO 25% MARKUP.

At pages 55 and 61-69 appellants argue that plaintiff's profit was limited *as a matter of law* to a 25% markup. At page 61 (heading "(e)") they complain that the trial judge refused to instruct that such a limitation existed *as a matter of law*.

At page 70 it is argued independently that the element of notice to the seller enters into the amount which the buyer can recover for loss of profits.

We answer the two arguments separately.

A. PLAINTIFF NOT LIMITED BY 25% MARKUP; COURT CORRECTLY REFUSED SO TO INSTRUCT.

Appellants' argument about a 25% markup limit is based upon the O.P.A. maximum which went into effect as to *wholesalers* in *August* of 1943. As stated above, appellants contend that plaintiff is subject to a 25% profit limit as a matter of law, and orally requested an instruction to that effect.

There are three answers to these contentions of defendants. *First,* the 25% limit is not applicable to the case at all. *Second,* supposing it were applicable, the record presents a *question of fact* as to whether plaintiff is subject to it. An instruction that it was subject to the limitation *as a matter of law* would have been error. *Third,* the request for instruction was oral and too late, for both of which reasons it was properly rejected.

1. 25% Profit Limitation Not Applicable.

The 25% limit of August, 1943 was inapplicable to the case for two reasons:

(a) Defendants did not plead the defense;

(b) The case was tried upon *defendants' theory* that everything subsequent to April 27, 1943 was *outside the issues.*

a. O.P.A. Limitation Outside of Issues Because Not Pleaded.

Appellants claim that any profit in excess of 25% would be in violation of the O.P.A. price regulations, and that therefore the plaintiff is supposedly limited to a 25% markup. Counsel rightly take the position that this objection is based on supposed *illegality*. See appellants' brief page 61:

> "Loss of profits may not be considered as the element of damages where the business from which they would have resulted was, or would have been *conducted in violation of law.*" (Italics added.)

Under the Federal Rules of Procedure, *illegality must be affirmatively pleaded by the defendant.* Rule 8(c) provides in part:

> "*Affirmative defenses.* In pleading to a preceding pleading a party shall set forth affirmatively * * * illegality * * *."

Before the rules there was some confusion as to whether illegality had to be specially pleaded, or whether it could be raised under the general issue. The rules have resolved this doubt. If the defendant does not set up illegality, it is not an issue in the case. Defendants did not set up O.P.A. price limits in their answer. Their fifth defense to the amended complaint is the only one touching illegality. It deals with an entirely different matter. See R. 24:

> "Neither plaintiff herein nor Chateau Montelena of New York, or both, ever had or now has the legal right to enter *into or perform the said*

agreement marked Exhibit A, as modified by the letter marked Exhibit B." (Italics added.)

This deals with the legality of *the original contract of purchase,* not with legality of *resale prices.* We are not faced with the question whether or not illegality may be set up in general terms. In this case the fifth defense *specifically refers to something other than prices on resale.* As to resale prices, there is no claim of illegality. *It is therefore not an issue in the case.*

Counsel quote part of the record where certain questions on O.P.A. ceilings were asked and answered without objection (Appellants' Br. pp. 62-65). But the answers brought out nothing. They were all to the effect that the regulations did not touch plaintiff. Apart from this, counsel correctly say that O.P.A. regulations are judicially noticed and are matters of law (Appellants' Br. pp. 62, 66). To question laymen about them is as meaningless as to *take evidence* on any other point of domestic law. The defense of illegality was a matter of applying law to the facts of the case. But the defense could not be raised at all unless pleaded by defendants. They did not plead it.

b. Case Tried on Defendants' Theory That All Occurrences After April 27, 1943, Were Outside the Issues.

The O.P.A. regulations on which defendants now rely went into effect *August 14, 1943.* The claim that it should control is a *reversal of the theory on which the case was tried.*

At the second trial the defendants took the position *that plaintiff had elected April 27, 1943 as the date of breach; that damages had to be proved exclusively from data available at that time; and that all subsequent events were irrelevant and outside the issues. On the second trial this entire position was sustained and adopted by the court.* See the following excerpts from the record:

> (R. 259-61) "Q. What was the value of the same dry wines specified in the agreement referred to in the month of June, 1943?
>
> Mr. Naus. One moment. Objected to, first as immaterial, and, second, as outside the isues, and thirdly, *as speaking of a market in June after an alleged election to treat the alleged repudiation on April 27, 1943 as a breach.*
>
> The Court. *Sustained on the last ground.*
>
> Mr. Bourquin. May I make the same offer of proof as to the value of the wines specified in the contract in the succeeding months following June 1943, and running down to date?
>
> The Court. Yes. *The ruling will be the same if the objection is the same.*
>
> Mr. Naus. *The objection is the same.*
>
> The Court. Are you satisfied with that?
>
> Mr. Bourquin. Well, I am not satisfied, your Honor.
>
> The Court. I mean so far as what the record will disclose.
>
> Mr. Bourquin. Well, I think if we may have a stipulation, Mr. Naus, that the same objection you would desire be offered if we offer the same questions——
>
> The Court. From June to date.

Mr. Naus. As far as it is within the power of counsel to concede or stipulate to that effect I do so.

The Court. Very well. *The same ruling and exception noted.*

Mr. Bourquin. Your Honor, I feel that I have encountered a ruling that perhaps to the questions to be properly put before the jury where objection would be sustained and *I have exhausted our position. * * *"* (Italics added.)

(R. 262-3) "Q. You told us, Mr. Bercut, that the value of the wines specified in the complaint —in the month of May, 1943, the value in the market was $6 for the dry wines, $6.25 for the sweet; is that true?

Mr. Naus. Objected to as repetitious, and *objected to upon the further ground* that it is now the intent to inquire further about a value at a date *subsequent to the date elected by the plaintiff as a breach, to wit, April 27, 1943.*

The Court. Are you adding something to it? *Did you add to it the month of May?*

Mr. Naus. Yes.

Mr. Bourquin. Perhaps, your Honor, that is correct. I formerly did ask him for the month of May.

The Court. Objection sustained."

(R. 263-4) "Mr. Naus. At this time, if the Court please, in view of the apparent misunderstanding, in the record, I now move the court to strike out the previous answer given a while ago by the witness with respect to that value in the market in the month of May, 1943, and to which he answered six dollars, upon the ground that the objection that has been made should

have been sustained, *and upon the further ground that it relates to a date other than the day of breach.*

The Court. Well I suppose for the purpose of clearing the record so there will be no misunderstanding, that that motion ought to be granted. *It is granted* and you may proceed with your examination.

Mr. Bourquin. And we may have an exception to the ruling?

The Court. Yes." (Italics added.)

A little earlier, at R. 255-6, there was the following:

"Mrs. Herzig. Q. Mr. Lusinchi, did you participate in a transaction on behalf of the Bercut Bros., or P. & J. Cellars, with the Utah Liquor Authority in 1943?

Mr. Naus. If the court please, before making an objection that I am about to make I will inform your Honor that at the former trial this witness referred to a matter of that nature *that did not occur until as I recall, about September of 1943.* Having that in mind, and knowing that that is undoubtedly what Mrs. Herzig has in mind, *I object to that question as being outside the issues.*

The Court. *It is outside the issues.* Objection sustained.

Mr. Bourquin. Exception."

These objections and rulings clearly define the theory of law which was followed in the trial court. It was that plaintiff had elected to consider April 27, 1943 as the date of breach; that damages must be calculated as of that date upon the evidence available on that date, in other words, upon the basis of fore-

sight; that plaintiff does not have the benefit of hindsight from subsequent events, and that all occurrences later than April 27, 1943 are immaterial. This theory is so clearly developed that it is obviously not changed by counsel's brief and abortive attempts to interrogate lay witness on questions of OPA law near the end of the trial.

Whether the foregoing theory is right or wrong, it was propounded by defendants, and adopted by the District Court on defendants' importuning. *Under it the defendants succeeded in excluding the plaintiff's proof of events subsequent to April 27, 1943.* Having ruled out the plaintiff's evidence, as beside the issues, defendants cannot now rely on such later developments themselves. Their theory makes immaterial any O.P.A. regulation or other law which was not enacted until after April 27, 1943. The O.P.A. regulation on which they rely was enacted August 9 and effective August 14, 1943. If events after April 27 are immaterial, they are just as immaterial to reduce damages as to enhance them.

Having adopted this theory in the District Court, appellants cannot seek a reversal by asking the Circuit Court of Appeals to adopt the opposite theory. See the following authorities:

3 *Am. Jur.* 433-4:

> "A party who prevents the adverse party from introducing evidence offered to establish a proper measure of damages may thereby estop himself from complaining of a charge which submits a different measure of damages."

Citing

Halsey v. Minn. So. Car. Timber Co. (1934), 174 S.C. 97, 177 S.E. 29, 100 A.L.R. 1,

where it was said (177 S.E. 29, 39):

"Did the court err in his charge as to the measure of damages? * * *

This last issue takes on a curious complexion. It is alleged as error that the court charged that the measure of damages would be the shortage in feet computed at $7.28 per thousand feet, because * * * there is no evidence in support of that figure as the value of the timber.

It is alleged in the complaint that that is the approximate value per thousand feet of 19,215,000 feet of timber which plaintiff claims he was assured was on the Hutto and Wiggins tracts. * * * *On the trial when plaintiff sought to prove the value of the several sorts of timber on the purchased property he was met with objection on the part of defendant* * * *The objection was sustained.* Although the answer denied this allegation of the complaint, the defendant offered no testimony to show the value of the timber. Later the plaintiff testified without objection that the value of long leaf pine was $10 per thousand feet, and that of short leaf pine $6 per thousand feet. * * *

It would seem that the defendant is not in a position to object that there is no evidence that the average price of the lumber was $7.28 per thousand feet. By its objection it prevented plaintiff from proving the value of each sort of timber from which the average price could have

> been ascertained, and it offered no such testimony itself." (Italics added.)

This case is as similar to the present case on its facts as two cases may well be. The defendants excluded evidence which the plaintiff offered; they offered no corresponding evidence of their own (in the present case: evidence of events subsequent to April 27, 1943. The quoted examination of Elman brought out nothing.). Then defendants try to take advantage of this situation by objection to instructions. In the *Halsey* case they objected to the *giving* of an instruction; in the present case to *refusal of a request.* In the *Halsey* case the instruction was given *in spite of* the situation created by the defendant's objection. In the instant case, the refusal of the instruction was *in accord with* the theory underlying those objections. The present appellants have, if anything, less ground for complaint. The case at bar is more favorable to the appellee.

The general principle that an appellant must stick to the theory which he induced the trial court to adopt is well recognized both in Federal and California decisions. See for example: *Dunn v. U. S.,* 284 U.S. 390, 76 L. Ed. 356, 358:

> "The case was tried on the assumption that the indictment was good as to that count, and we should make the same assumption."

Minneapolis & St. L. R. Co. v. Winters, 242 U. S. 353, 61 L. Ed. 358, 359:

> "In short, at the trial the defendant in no way saved its rights to deny that the parties were

engaged in interstate commerce at the time of the accident, or to object to the application of the Federal statute. On the contrary, without qualification it invoked and relied upon that statute and the rights that, because of that statute, it supposed itself to possess. There is an ambiguous assignment of error that the supreme court of the state erred in holding as matter of law that the plaintiff was engaged in interstate commerce, and in holding that the question of the plaintiff's assumption of the risk was for the jury, 'thereby depriving the appellant of a right guaranteed to it under the provisions of the Federal Employers' Liability Act'. But if the first clause is more than an introduction to and reason for the second, then, as we have indicated, no foundation for such an assignment was laid in the proceedings before the state courts. Therefore even if the courts and parties were wrong about the proper basis for the suit, that fact does not entitle the defendant to have the judgment reversed. It cannot complain of a course to which it assented below."

Los Angeles Inv. Co. v. Home Sav. Bank, 180 Cal. 601, 615;

Busch v. L. A. Ry. Co., 178 Cal. 536, 539.

The following cases hold specifically that the appellant cannot change his position with respect to the measure of damages:

Merrill v. Kohlberg, 29 Cal. App. 382, 386:

"Counsel for the plaintiff endeavored to present the case upon that theory, but was thwarted in his efforts to introduce evidence of the cost of manufacture by the insistent and successful objection of the counsel for the defendant that 'such

evidence was incompetent, irrelevant and immaterial, as the true measure of damages was (otherwise)'."

* * * * * * *

(pp. 386-7) "After having led the court into error and compelled counsel for the plaintiff to adopt and conform to an erroneous theory for the trial and determination of the case, it surely does not lie in the mouth of the defendant to insist in support of the appeal that the case should have been tried on the theory first adopted by the plaintiff, which counsel for the defendant now contends to be the correct one (cases)."

St. Louis, K. & S.E. R. Co. v. Ballard, 172 Ark. 151, 287 S.W. 738, 739 col. 2;

McDonald v. McNinch, 63 Mont. 308, 206 Pac. 1096, 1098.

Under these authorities the appellants' position in the trial court rules out the position which they attempt to take now. There they claimed that everything subsequent to April 27, 1943 was outside the issues and immaterial. They cannot now rely upon an O.P.A. regulation which was not promulgated until August 9, 1943 and did not become effective until August 14, 1943. Nor can they assign error for the court's refusal to instruct according to that regulation. Upon the record the plaintiff's proof of lost profits was not limited to 25%.

c. Summary.

The O.P.A. 25% limit on wholesalers, promulgated August, 1943, has nothing to do with this case. In the first place, it is an attempted defense of illegality

which defendants waived by not pleading it. In the second place, the case was tried on defendants' theory that everything after April 27, 1943 was outside the issues. This latter theory must be adhered to on appeal.

2. Question of Fact Whether 25% Provision Covers Plaintiff; Categorical Instruction Error.

If we were to concede that defendants could claim an O.P.A. regulation of August 27, 1943 was applicable to the case, and that such a regulation affected prices established *before its promulgation* the District Court was still right in refusing to instruct categorically that plaintiff was limited to a 25% markup. That is so *first* because Maximum Price Regulation 445 which makes the 25% provision attempts to fix prices only for *wholesalers* and *retailers*. On the other hand *processors* are subject to the General Maximum Price Regulation (see MPR 445, Sec. 4.1) and the record contains evidence sufficient to sustain a finding that plaintiff was a *processor*. An instruction that plaintiff was bound as *matter of law* by MPR 445's 25% limit on *wholesalers* would therefore have been error.

Second MPR 445 is not intended to alter price schedules established before its date.

Third since MPR 445 became effective August 14, 1943, it applied only to sales made on or after that date. The record, however, contains evidence which would support a finding that all of the wine could have been sold before then.

Any of these considerations makes appellants' proposed instruction at least partly wrong. The trial court was therefore justified in refusing it.

We shall take up each of the three objections to the instruction, and shall give the authorities that an instruction which is wrong in part or even misleading may be refused entirely.

a. Instruction Erroneous Since Evidence Supports Finding That Plaintiff is Processor.

As stated above, the 25% markup on which appellants' rely applies to wholesalers (MPR 445 Sec. 5, 4(b), 8 Federal Register 11161, 11168). Processors are put under the General Maximum by Section 4.1 (8 Fed. Reg. 11161, 11166); as are sellers who have wine processed for their own account (MPR 445 Section 5.1(b)(2)). *It is undisputed that plaintiff's list prices are legal under the General Maximum Price Regulation.* The respective definitions are contained in Sec. 7.12(b):

> (8 Fed. Reg. 11161, 11173) (2) 'Processor' means any person who:
>
> * * * * * * *
>
> (ii) Bottles under any brand name distilled spirits or wine belonging to him * * *.
>
> (iii) Causes distilled spirits or wine to be bottled or blended for his account under his own brand name.
>
> "(3) 'Wholesaler' means any person (except a monopoly state or primary distributing agent) engaged in the business of buying and selling dis-

> tilled spirits and/or wine *without changing the form thereof,* to persons other than consumers". (Italics added.)

The key to the question is whether plaintiff "bottles" or "causes to be bottled" the wine "under any brand name" or whether it sells the wine "without changing the form thereof". In the first case plaintiff would be a processor, in the second a wholesaler.

The only reason why the case presents a problem on this score, is that the *defendants* aged some of the wine in bottles. Had the wine been in bulk, and put into bottles by the plaintiff, there would be no question but that plaintiff was a processor under the above definitions. As to the unbottled 33,309 cases plaintiff was clearly a processor. And that was true regardless of whether the price had been fixed definitely enough to form a basis for calculating damages. But although defendants kept part of the wine in bottles, it is nevertheless true that plaintiff *completed* the *bottling process,* that plaintiff *changed* the form of the goods in certain respects, and that plaintiff sold under its own brand label. In its general business Park, Benziger was a processor—it was affected by the freezing of *bulk* wines (A. 72) and sold under its own label (see supra p. 26). In the Bercut deal plaintiff was to do any processor's work which was necessary upon bottle-aged wine: clean and polish the bottles, wrap them in tissue paper (R. 160-61, quoted as part of Elman's testimony in Appendix "A"); and plaintiff was going to affix the Park-Benziger label (R. 96-7, 151). Elman summed up his work in San

Francisco as (R. 101) "working and arranging for the *bottling* of those wines." All this testimony taken together supports the finding that plaintiff "bottled" (i.e. completed bottling) the wines even though they were partly aged in bottles by the seller. Plaintiff did not sell the wines as they came out of the cellars, but polished, wrapped and labeled them so as to make them more attractive to the trade and more marketable. They were admittedly to be sold under plaintiff's brand name. Plaintiff's handling of the goods does not come within the above definition of wholesaler who sells merchandise *"without changing the form thereof."*

Since there is evidence to support a finding that plaintiff was a processor of the Bercut wines, it would have been error to instruct categorically that plaintiff was subject to the 25% limit. Such an instruction amounted to saying that the plaintiff was a wholesaler *as a matter of law,* in disregard of the above evidence to the contrary. Since the instruction would thus have been contrary to the evidence, it was properly refused.

b. MPR 445 Not Applicable to Price Schedules Established Before Its Date.

At appellants' brief page 62 counsel argue that OPA price regulations *may be* made to override pre-existing contracts. The power may be conceded, but we still have the problem of construction, whether a given regulation is intended to be retroactive or not. And appellants' own authorities indicate that MPR 445 was not intended to be retroactive.

Counsel cite *Long Island Structural Steel Co. v. Schiavone-Bonomo Corporation,* 142 Fed. (2d) 557 (CCA 2), affirmed upon the District Court opinion, 53 Fed. Supp. 505. This case involved the maximum on scrap-iron and steel. Section 1304.1 of Revised Price Schedule No. 4 Iron and Steel Scrap is quoted at 53 Fed. Supp. 506. It contains the express provision that its terms shall apply *"regardless of the terms of any contract of sale or purchase or other commitment theretofore entered into".*

The same is true of the regulation on Cotton Gray Goods, Price Schedule No. 11, Section 1316.2 quoted in *In re Kramer & Uchitelle, Inc.,* 288 N. Y. 463, 470.

This shows that when price regulations were intended to be retroactive, they were so drafted in unmistakable terms.

MPR 445 on the other hand contains no such provision. It contains only the conventional repealing clause to the effect that prior regulations are superseded (Sec. 5.1(c)). And it expressly exempts sales under price lists *published under state law before August 19, 1943* (Sec. 5.10):

> "Provided, That this Article shall not apply to any sale which a wholesaler, retailer or primary distributing agent is required by statute, ordinance, or regulation to make at a price posted or listed prior to August 14, 1943, with a state or other public authority (if the price so posted or listed is greater or less than that established by this Article for such sale) until on and after the first effective date for prices so posted and listed at the first opportunity after August 19, 1943."

Apart from this, it is a well settled principle of interpretation that a statute will not be construed retroactively unless expressly made so (50 Am. Jur. 495 citing *inter alia: Hassett v. Welch,* 303 U.S. 303, 314, 82 L.Ed. 858).

Accordingly MPR 445 must be held not to disturb price schedules, approved and established before August 19, 1943. Compare also Elman's testimony, R. 335.

It would therefore have been error to instruct the jury that plaintiff was subject to the 25% limit of MPR 445.

c. Evidence That Wine Could All Have Been Sold Before Effective Date of MPR 445.

This subject may also be considered from another standpoint. Maximum Price Regulation 445 was promulgated August 9, to be effective August 14, 1943. It obviously did not affect sales made before its enactment. Not only were the damages in the present case taken as fixed on April 27, 1943, but there was no evidence to show that the wine could not all have been sold before August 14, 1943. In fact, all the evidence was the other way. Prospective wine purchasers were driving sellers "crazy" (Cholet R. 233). The only limitations on sales would have been the instalment deliveries from the Bercuts. From the state of the wine market it can readily be inferred that buyers would have been glad to buy the future deliveries on forward contracts, and even to pay cash in advance for them.

Thus the record supports the finding that the entire profit could have been made before M. P. R. 445 saw the light of day.

d. Instruction Properly Refused if Wrong, Partly Wrong or Misleading.

If a proposed instruction is incorrect it is properly rejected. Even where it is incorrect in part, the court may reject the whole of it. See:

Miles v. Lavender (1926), 10 Fed. (2d) 450 (C.C.A. 9).

(p. 455) "Furthermore it was but a paragraph in a request, part of which was clearly incorrect, and the court was under no duty to separate one portion from another, but was justified in refusing the whole request."

Haffin v. Mason (1873), 82 U. S. (15 Wall.) 671, 21 L. Ed. 196, 197.

"the proposition which the court was asked to sanction assumed the liability of both [defendants] and a party cannot assign for error the refusal of an instruction to which he has not the right to the full extent as stated, nor is the court bound to modify the instruction moved for by counsel, so as to bring it within the rules of law."

To the same effect:

Chicago G. W. R. Co. v. Robinson (1939), 101 Fed. (2d) 994, 999, citing many cases (C.C.A. 8);

Keene v. Kelly, 49 Fed. (2d) 874, 876 (C.C.A. 1);

American Surety Co. v. Blount C. Bank, 30 Fed. (2d) 882, 884 (C.C.A. 5);

Catts v. Phalen (1844), 43 U. S. (2 How.) 376, 382, 11 L. Ed. 306.

Even where an instruction is simply *misleading* there is no error in refusing it.

Panama R.R. Co. v. Johnson, 264 U. S. 375, 68 L. Ed. 744, 755.

> "The defendant also complains that two requests which it preferred on the subject of assumption of risk were denied. The requests were so framed that, considering the state of the evidence, they would not have conveyed a right understanding of the subject, and might well have proved misleading. Their refusal was not error."
>
> *American Surety Co. v. Blount C. Bank, supra.*

These cases cover every phase of the appellants' requested instruction on 25% markup. Either it was incorrect as disregarding the evidence tending to show that plaintiff was a processor, not a wholesaler; or it disregarded the evidence tending to show that wine could all have been sold before August 14, 1943. There was therefore no error in refusing to give the instruction.

3. Instruction Properly Refused as (a) Oral and (b) Too Late.

Appellants' request for an instruction on the supposed 25% limit was made orally when the jury came in with a question (R. 526, 535).

We are dealing with the second trial of the case. Defense counsel knew the issues and the evidence before they started. Previous to the close of the evidence

counsel requested one and only one instruction on price maxima, as follows:

(Defense Request No. 36, R. 62.)

"In first arriving at the amount of gross profits as a basis from which to make the necessary deductions to determine net profits, I instruct you that you cannot in any event use a greater markup by plaintiff over the cost to it than the markup permitted under OPA regulations as a price ceiling; ~~and the burden of proof is on the plaintiff~~.

Davis v. Carnegie Steel Co., 6 Cir., 244 Fed. 931, 934;

Molyneaux v. Twin Falls Canal Co. (Idaho), 94 A. L. R. 1264, 1277, 35 Pac. 2d 651, 659.

Given St. Sure, D J"

This instruction the court gave, striking out only the reference to the burden of proof (R. 505-6, 520). (Since illegality is an affirmative defense under Rule of Civil Procedure 8 (c), the burden of proof is evidently upon the defendants). No more specific request in writing was ever made. None more specific request of any kind was made until after the jury had retired and returned. The fact that the jury should have asked about the August 1943 ceiling at all simply means that defendants had put over a point to which they were not entitled (see pp. 28-39, supra). Rule of Civil Procedure 51 requires requests for instruction to be made at the close of the evidence and in writing. Since the request was made after the retirement of the jury and orally it was objectionable on both grounds and therefore was properly refused.

Flexibilis Werke etc. v. Hess, 205 Fed. 850 (C.C.A. 3), is directly in point. The Third Circuit Court of Appeals said:

> (p. 856) "Sometime after the jury had retired they returned to the courtroom and asked for further instructions; that is, that the court would *more fully define* the meaning of the secret process. In response, the court proceeded, first, to define what is not a secret process, * * * Then after calling their attention to the question as to what secrecy might or might not attach to the separate steps in the process, the court concludes * * *
>
> (p. 857) After the court had thus instructed the jury, counsel for the plaintiffs asked that they be further instructed,
>
> 'That there is the possibility of a secret process being composed of a combination of well known materials.'
>
> Counsel proceeding to elaborate the instructions thus asked for, *was stopped by the court, on the ground that counsel's opportunity for submitting points had passed when the case had been submitted to the jury,* and the further instruction, as requested, was therefore refused. *In this refusal the court was justified. The orderly practice in the conduct of trials in the District Court does not permit that where a jury on its own motion returns to the court for further instruction, the case should again be opened for argument, or the submission by counsel on either side of further points for instruction."* (Italics added.)

This case accords with the literal provisions of the new Rules (51), so we submit, is still authority.

A decision under the new rules, holding that the instruction is properly refused where the request is not in writing is: *Dallas Ry. & T. Co. v. Sullivan,* 108 Fed. (2d) 581 (C.C.A. 5).

For earlier cases to the same effect, see:

A. T. & S. F. v. Gamble, 177 Fed. 644, 652 (C.C.A. 9) (too late);

Keystone Bank v. Safety Banking & Tr. Co., 179 Fed. 727 (C.C. E.D.) (oral).

In the present case the court responded to the jury's request by calling their attention to Elman's testimony on O.P.A. ceilings. *This was done by stipulation of both sides.* The testimony had been elicited by defense counsel's questions, and was the only thing in the record on the subject (R. 533—the reference to the typewritten transcript is to R. 334-5, beginning "Mr. Naus: No I am not trying to qualify you" and ending "We would have kept the same prices"). The court's remarks as to what it might do in the event of another request from the jury, are hypothetical and beside the point (R. 535 ft.). *Under the authorities cited the court was justified in refusing counsel's oral request for further instructions when the jury returned.* That disposes of this phase of the case.

B. PLAINTIFF'S RIGHT TO LOST PROFITS NOT AFFECTED BY NOTICE.

Appellants' other attack upon plaintiff's damages for loss of profits is on page 70 of the brief. This in effect argues that plaintiff cannot recover for "extraordinarily high" profits unless the defendant had previous notice of plaintiff's resale contracts. The

Wisconsin case of *Guetzkow Bros. v. Andrews*, 92 Wis. 24, 66 N.W. 49, is cited.

There are three answers to this.

1. In the first place the entire proposition is put forth as a corollary to the rule of *Hadley v. Baxendale.* We have already shown that the instant case does not come under that rule, and that appellants' discussion of it results from a confusion of issues. The rule of *Hadley v. Baxendale,* including the entire principle of notice to the defendant, is a rule of *special damages.* In the present case plaintiff made no attempt to show special damages and the problem before the court is the rule of *general damages* for breach of a contract to sell goods not otherwise available on the market.

2. There is nothing to show that plaintiff's markup was "unusually high". Furthermore, it may be inferred that defendants had knowledge of plaintiff's probable profits. They were businessmen of long and wide experience, and themselves told Elman that they expected the price of wine to go up (R. 122, 180).

3. Finally the *Guetzkow* case was effectually disapproved in *Edwards Mfg. Co. v. Bradford,* 294 Fed. 176, 182-5 (C.C.A. 2). The opinion discusses *Guetzkow v. Andrews* and does not follow it (294 Fed. 176, 185).

C. SUMMARY.

The court correctly instructed the jury on the measure of damages. On the record, plaintiff was not bound by a 25% ceiling or any limitation *other than its published lists.* Such ceiling involves an attempt

to raise the issue of illegality which had not been pleaded. Furthermore, it depends upon M.P.R. 445, enacted after April 27, 1943. Defendants took the position and induced the trial court to hold that all matters after April 27, 1943 were irrelevant. That theory cannot be changed on appeal. Finally an instruction imposing a 25% limit would disregard evidence that plaintiff *processed the goods,* and would also disregard evidence that the wine could all have been sold before August 14, 1943, the effective date of MPR 445.

Nor is plaintiff's right to prove lost profits dependent upon any advance notice to defendants.

V. NO ERROR IN INSTRUCTIONS AS TO BURDEN OF PROOF.

At appellants' opening brief page 60, counsel complain about supposed failure to instruct on the burden of proof.

The first answer is that the court *did* instruct on the burden of proof. Defendants' contention is simply not supported by the record. In addition, defendants cannot claim error, because they did not except to the supposed omission.

A. COURT INSTRUCTED ON BURDEN OF PROOF.

1. By their second request for instruction (R. 40) defendants limited the issue of liability. The contract was admitted by the pleadings (Ans. to Amended Compl. par. II, R. 22). By their second request de-

fendants admitted that they delivered no wine, and *staked everything upon a supposed abandonment of the contract.* In other words the *issue of liability was made to turn upon an affirmative defense.* (See Rules C.P., 8(c) "waiver, or any other matter constituting an avoidance or affirmative defense"). As to that *the burden of proof was on the defendants* and the court so instructed (Plaintiff's request, No. 11, R. 33, given in part at R. 513. Defendants took no exception, R. 500-501.).

2. This leaves the issue of damages. Defendants requested two instructions upon the burden of proof as to damages. One was erroneous and was refused; the other was correct and was given.

The erroneous request was contained in the last sentence of defendants' request No. 36 (R. 62). It purported to tell the jury that plaintiff had to prove the legality of its prices under O.P.A. regulations. We have seen that illegality is an affirmative defence (Rules C.P. 8(c)). Furthermore, a person's acts are presumed to be legal; he does not have to prove legality at every step. So the court was clearly correct in refusing this part of the request and defendants took no exception to the refusal (Appellants' Op. Br. p. 60).

Defendants' other request touching the burden of proof was given. It is Defense Request No. 31 (R. 57) which the court gave at R. 521. It says in part:

> "Now, even though the law lays down the rule that in case of a seller's breach of an obligation to

> deliver goods not obtainable elsewhere the buyer's damages may be measured by his loss of profits, nevertheless *the buyer must make proof* showing that it was reasonably certain that profits would have been made." (Italics added.)

To say that "the buyer must make proof" is equivalent to saying that the burden of proof is on the buyer. The language may be quaint, but then it is the language of defendants' counsel.

Had defendants desired other instructions on the burden of proof of damages, they could have asked for them. As it was, the court gave all their sound requests. Defence counsel's remark at R. 505-6 that he assumed the court would instruct on the burden of proof in stock instructions has no significance whatsoever. It was made *on the day after* all the requests had been discussed—in other words, too late. *Furthermore Defence Request No. 2 (R. 40) had placed the burden on defendants and made inapplicable all the ordinary burden of proof instructions so far as the issue of liability was concerned.* Under the circumstances defence counsel had no right to rely upon stock instructions on this subject. The court merely acquiesced in counsel's refusal to except (R. 506). *Scarborough v. Urgo,* 191 Cal. 341 (Appellants' Br. p. 60), was a negligence case in which the trial court erroneously applied the doctrine of *res ipsa loquitur.* It obviously has no pertinence here.

B. NO EXCEPTION FOR ALLEGED FAILURE TO INSTRUCT.

Defendants took no exception to any supposed failure to instruct on burden of proof. In one instance the refusal to take exception was express (R. 505-6). They did not even take exception to the court's supposed failure to include a stock instruction on burden of proof. This would have been feasible even after completion of the court's charge, since plaintiff opened the door by itself taking an additional exception (R. 524-5). Instead of following suit, defence counsel stood upon the exceptions taken the day before and objected to plaintiff's line of action (R. 526). Defendants cannot now raise a point to which they took no exception at the trial.

C. SUMMARY.

There was no error in instructions on burden of proof. Defendants assumed the burden of proof on the issue of liability; the court gave a requested burden of proof instruction on the issue of damages. Besides, defendants saved no exception to this part of the charge.

VI. COURT CORRECTLY MODIFIED DEFENDANTS' REQUEST NO. 35 (Appellants' Br. pp. 71-4).

The contract between plaintiff and Serge Hermann provides that Hermann shall receive "50%" of the net profit (R. 91). Defendants claim that *net* profit is a figure to be reached *after deduction* of the fifty per cent!

This is contrary to the language of the contract which clearly assumes that net profits have been determined *before the deduction.* We believe that the situation is in every respect covered by the following language of *Russ v. Tuttle,* 158 Cal. 226:

> (p. 230) "It is urged, however, that the jury might have found the damage to be less, because of the fact that there was testimony tending to show that the plaintiff, after taking the option, had assigned the whole or a part of it to one Buhne. Neither of these circumstances would affect the applicability of the code section. The damage occasioned by the breach of the contract was defined by the statute. That damage was recoverable by the party or parties maintaining the action. Whether the plaintiff after recovery would be bound to account to Buhne for a part or all of the amount received by him was a question between him and Buhne. The defendant was in no way concerned in it. In fact, the point urged does not at all bear on the measure of damages, but goes rather to the question whether the plaintiff was the real or the sole party in interest, and as such authorized to bring the action in his own name. * * *
>
> (p. 231) Furthermore, it may be doubted whether the defense that the plaintiff was not the real party in interest would have been available to the defendant even if properly pleaded. In *Giselman v. Starr,* 106 Cal. 651 (40 Pac. 8), it is held that 'where the plaintiff shows such a title as that a judgment upon it satisfied by defendant, will protect him from future annoyance or loss, and where, as against the party suing, defendant

> can urge any defense he could make against the real owner, then there is an end of the defendant's concern and with it of his right to object' * * * A judgment in favor of plaintiff will, therefore, protect the defendant against any claim by Buhne. So far as such defendant is concerned, the question of who is the real party in interest as between Russ and Buhne is immaterial."

Followed in

Anglo-Cal. Nat. Bank v. Lazard, 106 Fed. (2d) 693, 699 (C.C.A. 9).

Furthermore in all of the following cases where an employee is given a percentage of "net profits", "net profits" is arrived at *before deduction* of the contingent commission:

Swerdfeger v. U. Acc. Corp., 9 Cal. App. (2d) 590;

Boradari v. Peterson, 86 Cal. App. 753;

Read v. Forced Underfiring Corp., 82 Utah 529, 26 Pac. (2d) 325;

Wallace v. Beebe, 94 Mass. (12 Allen) 354, 357;

Foster v. Goddard, 9 Fed. Cas. 534, 541.

VII. COURT CORRECTLY REFUSED DEFENSE REQUEST NO. 37 (Appellants' Br. p. 74).

Defence request No. 37 attempts to apply a principle which does not exist in the law of sales. The case which appellants cite was on a contract for services, i.e., to slaughter and pack hogs. Appellants

made the same point in the District Court, but neither there nor here have they been able to find a *sales* case to support them.

The rule of damages for breach of a contract *of sale* was correctly stated by the court in its instructions.

Furthermore, appellants defeat their own argument in trying to bolster it (Appellants' Br. p. 80). They say that the contract was to be performed during a period of shortage. *This would make the plaintiff's risk in reselling practically zero.* Wine prices could "collapse" only if the French and Italian wine business got back to its pre-war level which was unlikely and has not happened. Even if defendants were entitled to their request in the present *sales* case its omission could not be prejudicial.

VIII. APPELLEE'S REQUEST NO. 10 WAS CORRECT (Appellants' Br. p. 77).

The court gave plaintiff's request No. 10 (R. 32-3):

"Plaintiff's Instruction No. 10

> You are instructed that the defendants have raised the defense of plaintiff's alleged inability to pay for wine which the plaintiff purchased under the contract. You are instructed that the defendants were not justified in repudiating the contract unless the plaintiff were actually insolvent. The burden of proving such a defense is on the defendants. You are instructed that no evidence has been offered tending to show that the plaintiff is

or ever was insolvent. Mere doubts of the solvency of the other party afford no defense to the party who refuses to perform the contract according to its terms because of such suspicion.

3 Williston Rev. Ed. p. 2475.

Given St. Sure, D J"

Defendants raised the supposed inability of the buyer (Fourth Defence, R. 24). This question is considered in 3 *Williston on Contracts* (Rev. Ed.), Section 880. The plaintiff's instruction No. 10 follows Williston's text. Defendants asked the court to apply Section 881 of Williston instead. That section, however, deals not with payment of money but with *delivery of specific property* not in the possession of the *seller*. Whatever may be the rule in such cases, a different rule governs the question of the *buyer's ability to pay*. The difference is recognized in *Gray v. Smith,* 83 Fed. 824, 829, a Ninth Circuit case, cited in *Brown v. Lee,* 192 Fed. 817, on both of which defendants rely.

The buyer's ability to pay is governed by Section 880 of Williston, which is embodied in the instructions. It may be added that the Civil Code (Sec. 1511) enumerates excuses for nonperformance and does not include the other party's financial *inability*. The instruction was, if anything, too favorable to the defendants. Defendants misstate *Western Grocer Co. v. New York Oversea Co.,* 28 Fed. (2d) 518. The case gave judgment for the plaintiff buyer. It contains a dictum (28 Fed. (2d) 518, 520), that the *seller* could

not sue the buyer for anticipatory breach if the *seller* was unable to make delivery of the property he was supposed to sell. This accords with the above distinction between contracts to pay money and contracts to deliver specific property. *Peterson v. Wellsville City,* 14 Fed. (2d) 38, involved a grading contract, not a contract of sale. It is cited in support of the dictum in *Western Grocer Co. v. N. Y. Oversea Co.* Plaintiff's Instruction No. 10 stated the correct law respecting *contracts to pay money.*

IX. CONCLUSION.

Loss of profits is a proper measure of *general damages* where the seller fails to deliver goods which cannot be obtained elsewhere. The record contains sufficient evidence from which to form an estimate of plaintiff's probable profits.

Upon the record these profits were not affected by an O.P.A. ceiling promulgated in August, 1943, since defendants tried the case on the theory that everything subsequent to April 27, 1943 was outside the issues. Defendants proposed instruction on this subject was also objectionable on other grounds, and was properly refused for the procedural reason that it was requested orally and after the jury had retired. The court properly held that Hermann's 50% should not be deducted from the recovery.

Appellants' other contentions are likewise unsound.

The judgment should be affirmed.

Dated, San Francisco,
January 3, 1944.

Respectfully submitted,

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(Appendices A and B Follow.)

Appendices A and B.

Appendix A

APPELLANTS' MISSTATEMENTS OF RECORD.

(References indicated by letters "A.O.B." are to pages of Appellants' Opening Brief.)

> (A.O.B. 3, ft.) "Prior to the contract with appellants Bercut, neither Serge Hermann, nor his wife, had ever bought or sold wine on their own account (R. 187), with the single exception of a previous transaction, relating to one carload, with a man named Feldheym (R. 187)."

This construes the evidence favorably to the appellants instead of the appellee. The testimony is as follows:

> (R. 186) "Q. That Chateau Montelena of California, that is the business that this Mr. Feldheym is connected with?
>
> A. Was connected * * *."
>
> (R. 187) "Q. Did you come out here solely to settle that controversy or did you come out for some other purpose?
>
> A. I came for the purpose of finding wine. I had to come to California several times a year. I have done that for the last several years. It was not my first trip to California.
>
> Q. Well it is the *first trip to California* in which you ever attempted to buy wine *for your own account,* isn't it?
>
> A. Absolutely not, because I closed a contract with Chateau Montelena the year prior.
>
> Q. I asked you if that transaction between your wife under the name of Chateau Montelena of New York, that transaction, the one with Feldheym, was the first transaction in which you or

she had ever sought to buy wine on your own account?

A. That is correct. We used a wholesaler's license there because we had that line.

Q. Up to that time, you had been simply a middleman or broker?

A. Correct."

Counsel's last two questions here confused Chateau Montelena of California and Chateau Montelena of New York; no previous question had been asked as to whether that was the first time that Mr. and Mrs. Hermann had ever acted on their own behalf. The only question was whether that was *the first trip to California made on their own behalf.* This is the meaning which must be given to the entire passage under the rule that when testimony is subject to two interpretations the one must be adopted which favors the appellee (unless perhaps where "clearly erroneous"). *Gates v. Gen. Cas. Co.,* 120 Fed. (2d) 925, 929 (CCA 9); *U.S. v. Ingalls,* 114 Fed. (2d) 839, 842; *Helvering v. Johnson,* 104 Fed. (2d) 140, 141, aff'd 60 Sup. Ct. 293; *U. S. v. Gamble-Skogmo,* 91 Fed. (2d) 373, 374; *Columbian Nat. L. Ins. Co. v. Comfort,* 84 Fed. (2d) 291, 292.

> (A.O.B. p. 5) "Hermann came to San Francisco and in a roundabout way learned that appellants Bercut were holding a stock of wine (which turned out to be the 26,691 cases later covered by the contract) * * *."

Whether the contract price was definite as to more than 26,691 cases is the question considered in our cross-appellant's brief. But there is no question that

the stock consisted of, and the contract referred to, 60,000 cases, not merely 26,691.

> (A.O.B. p. 10) "It had simply happened that in February 1941, or two years before the deal with Hermann, the Bercuts had obtained majority control and management of a cold storage business in San Francisco, known as Merchants Ice and Cold Storage Company."

It is common knowledge such things don't "simply happen".

> (A.O.B. p. 26) "There is no evidence that any orders were taken or sales made under either list."

The record is contrary. Elman testified (R. 298):

> "Mr. Bourquin. Q. Mr. Elman, prior to the date of April 27, 1943, had your concern, Park, Benziger, sold or made any commitments for the sale of any of these wines?
>
> A. We did make a commitment * * *.
>
> Q. You did make a commitment?
>
> A. We did make a commitment for the sale of that wine to one of our wholesalers.
>
> Mr. Bourquin. Q. Without telling us what it was, when you say you made a commitment, what was the nature of your commitment?
>
> A. Took an order for it.
>
> Q. Took an order, accepted an order?
>
> A. Yes.
>
> Q. For how much and what type of wine?
>
> A. 1200 cases of the P & B California wines, which we had purchased from the Bercuts.
>
> Q. Dry or sweet?
>
> A. They were mixed."

Elman's testimony at R. 330 implies that this order was given after the customer saw the price list. Moreover it certainly is to be presumed that sales were made according to the price list since the price lists were posted under requirement of the laws of New York (R. 305, 308, 312, 315, 316).

> (A.O.B. p. 27) "In addition to that, Elman who was not an accountant or auditor and who did not produce any accounts or books, assumed that the appellee would have an overhead expense of six per cent of the selling price."

Elman was vice-president in charge of sales and promotion, and testified from his knowledge, did not merely "assume". See,

> (R. 69) "Q. And you are connected with the Park, Benziger Company, are you?
>
> A. Yes, sir.
>
> Q. What is your connection with the corporation?
>
> A. I am the vice-president."

> (R. 70) "Q. You are the vice-president?
>
> A. In charge of sales and promotion.
>
> Q. Sales and promotion, that is the function committed to you, is it?
>
> A. Yes, sir.
>
> Q. How long have you been with Park, Benziger?
>
> A. Since 1939, sir."

> (R. 301) "Q. Mr. Elman, you told us the other day that you as vice-president were charged with the sales and promotion of the product of Park, Benziger & Company, is that correct?
>
> A. That is correct, sir.

Q. As such do you or not have to do with the costs or charges that your company incurred in the sales and promotion of those products?

A. Yes, definitely.

Q. Do you know what the costs and charges to your company were and ran in April 1943 for the marketing at retail of commodities of the type and quantity specified in Plaintiff's Exhibit 2 here?

A. Yes."

(R. 302) "The Court. Q. How long did you say you have been with the Park, Benziger Company?

A. Since 1939, your Honor.

Q. I think you said that the business consisted of imported wines and whiskies?

A. Yes.

Q. Did you have anything to do with labeling and marketing those imported wines?

A. Yes, your Honor, I was actively engaged in the sales and promotion of all the merchandise of Park, Benziger.

Q. And you had been since 1939?

A. 1939, yes."

(R. 304) "Q. Mr. Elman, what would the costs and charges for the handling and promotion and sales of wines——

The Court. Such as that described in the contract, Exhibit 2——

Mr. Bourquin. Q. (continuing). ——run you per case, per carload or per thousand cases in April, 1943?

A. About six per cent of the price, the selling price, your Honor * * *

The Court. Q. Whether it was 1000 cases, 5000 cases or 30,000 cases?

A. It was based on the total volume of business we do per year, your Honor.

Mr. Bourquin. Q. It would run constantly irrespective, as the court has asked you, of the number of cases involved?

A. That is right."

(R. 313) "Q. Did the charges that you have given us, six per cent of the selling price, not include your transportation charges to New York?

A. No they did not include the transportation charges.

Q. Do you know what the transportation charges on liquor carloads—what charges prevailed for the shipment of such from San Francisco to Park, Benziger in New York in April of 1943?"

(R. 314) "A. Approximately 35 cents a case.

Q. Approximately 35 cents a case.

A. Freight and insurance.

Q. Were there any other charges accruing to you in the operation of your business in the handling of wines of this type at that time in New York, April 1943, other than I have mentioned, namely, the six per cent operating charge, and you mention the transportation and insurance?

A. None, sir."

(R. 315) "Mr. Bourquin. I will call attention to the prices filed and posted for wholesale by Park, Benziger Company of California P & B Brand * * *"

(R. 319) "The Witness. You want the outline of the costs of that, as I understand?

Mr. Bourquin. Please.

A. This merchandise is posted at these prices f.o.b. San Francisco. Therefore there wouldn't be any question of freight entering into those particular prices, they were sold f.o.b. here.

Q. And insurance?

A. Freight and insurance. There would be no handling on our end of it there, other than a rebilling process for wholesale sale, since it was sold to the buyer here in San Francisco. The only work that we would possibly do would be the rebilling of the merchandise to the people we sold it to. We figured the overhead on that at two per cent, sir.

* * * * * * *

Q. So in the wholesale you are charged with two per cent, and in the retail six per cent plus 35 cents a case?

A. Transportation and insurance."

(A.O.B. p. 28) "The foregoing is all the evidence laid by appellee before the jury as a basis of supposing or finding a loss of expected profits * * *."

In addition to the testimony quoted on pages 27-8 of appellants' brief, plaintiff also introduced evidence as to the state of the wine market at the execution of the contract and soon afterwards. See:

Cholet (R. 232-7); Lusinchi (R. 253-4);

(quoted in Appendix "B", infra);

Elman (R. 300, 320);

(quoted in part, supra).

(A.O.B. p. 28) "Appellee made no proof of the cost of the labels."

Appellee proved that the selling expense on retail sales was 6%. Details could have been asked on cross-examination but were not. See cross-examination of Elman (R. 320-40).

> (A.O.B. p. 29) "Any profits made by appellee were immediately paid out by it in the form of dividends to Finlay, Holt & Company (R. 338)."

The testimony is that payments to Finlay, Holt & Company (the present corporation) were made *at the end of each year* (R. 338):

> "Q. Then if, as and when Park, Benziger & Company made any profit since, it has immediately been paid out in dividends to Finlay, Holt & Company, hasn't it?
>
> A. Not immediately; at the expiration of the year."

Appendix B

(R. 231-5) Pierre J. Cholet,

called as a witness on behalf of plaintiff; sworn.

"Q. What is your business, please?

A. Wine merchant.

Q. Wine merchant. May I ask how long you have been in the wine business?

A. Ever since 1933 in this country, and previous to that in Europe.

* * * * * * *

Q. How long have you been in business in California?

A. Since October, 1942.

Q. Where prior to that time had you done your business in the United States?

A. I was in the East. I had a consulting business in New York up to 1939. Then I became associated with California Wine Sales, of Lodi, California, as Gulf Coast manager, stationed in New Orleans, and covered all the territory of Texas, Louisiana and Florida.

Q. That was what period, please?

A. That was from 1939 to January, 1942; September, 1939 to January, 1942.

Q. Prior to your entry in business in the United States, you said you had been in business in Europe, in the wine business.

A. Yes; my family was in the wine business.

Q. What part of Europe, please?

A. In Tours, France.

Q. So you were born and raised in the wine business?

A. Yes.

Q. At the present time what is the nature of your wine business?

A. Well, producing wine and buying wine, and shipping wine in bulk.

Q. Are you familiar with the wine industry and the circumstances of it in California?

A. Yes, I am.

Q. Were you familiar with it prior to January of 1943?

A. Yes, I was.

Q. Will you please tell us, Mr. Cholet, what was the circumstance of the wine industry, what was the situation in it in 1942 and at the opening of 1943, with particular reference to wines of the types we have spoken of here, still wine?

A. Well, the demand for wine started to become very active in the spring of 1942, and the prices naturally started to climb, as the demand became greater, and several large whisky outfits came into the State of California and started buying wineries and accumulating inventories sometime in the fall of 1942, I believe it was, and created a great shortage, with the result that the majority of the bottlers of the country were without a source of supply, and started coming to California to look for new sources of supply. I was one of them. As a matter of fact, I came here in October because my partner was ill, and there was no sense of being out selling when we had no merchandise for sale. We were brokers at that time, and we were forced into the producing business because we had to get wine.

Q. So you came to California in the latter part of 1942 to meet that situation?

A. Yes.

Q. What was the influence and the progress of the situation from October, 1942 up, on through the early months of 1943?

A. It became much worse, because all these bottlers were here and were knocking at the doors of the wineries, and the producers, every day, and getting everyone crazy, and naturally when the next one came the price had gone up a little bit and no sales had been made. That went on until the time that OPA stepped in to attempt to put a stop to the craze of price raising.

* * * * * * *

Q. Let me ask you, at that time and on from that period was there any market in California and San Francisco for wine of that type?

A. There was a very active market, and there still is. As a matter of fact, it is still rather difficult, it is difficult for us, especially as wine merchants to find even ordinary wine. We have stopped looking for that class of merchandise long ago.

* * * * * * *

A. There are many people, such as ourselves, who would like to buy it, and there are many consumers who would buy a bottle directly from the liquor store.

Q. Do you know, and did you know during the period 1943 commencing with the months of March and April and running through the year, whether wines of similar type were being bottled and sold in San Francisco and California?

A. Oh, yes.

Q. Do you know whether concerns were handling similar wines?

A. Yes.

Q. Will you tell us whether or not owing to the influence and demand created, as you have described, since the latter part of 1942, that there has since that time and continues up to now to be a most active market for that type of wine in California that we have ever experienced?

A. Yes, it has.

Q. Do you know, Mr. Cholet, what the price reaction was to those conditions in that type of wine in the months of January, February, March, April and May, 1943?

A. They went up in price."

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(R. 253-4) Marcel Lusinchi,

called as a witness on behalf of plaintiff; sworn.

"Mrs. Herzig. Q. Mr. Lusinchi, will you please state your business?

A. Division merchandise manager, City of Paris Dry Goods Company.

Q. How long have you held that position?

A. Around nine years.

Q. Do you live in San Francisco?

A. Yes.

Q. Now, Mr. Lusinchi, in your position have you purchased wines which have been made in the State of California?

A. Yes.

Q. Over the last eight or nine years?

A. Yes.

Q. Are you familiar with the conditions in the market on wines?

A. At the present time?

A. Yes.

Q. Were you familiar with those conditions in January of 1943?

A. Yes.

Q. And throughout the year 1943?

A. Yes.

Q. Did you know about the market conditions in the fall of 1942?

A. Yes.

Q. Would you state what was happening about that time?

A. Well, at that particular time, due to conditions in Europe, there was a shortage in this country, and the market tended to rise, and there still is a shortage of California wines in the State today.

Q. What effect did that have on the price of wines in general?

A. The wines started to increase in price."